IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1589

TOM BENSON CHEVWAY RENTAL & LEASING, INC.,
Petitioner,

v.

KENNETH WAYNE ALLEN AND WIFE, DOLORES ALLEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

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TO THE SUPREME COURT OF THE UNITED STATES:

Tom Benson Chevway Rental & Leasing, Inc. hereby respectfully petitions the Court to issue a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, sitting in the City of El Paso. By this writ the Court can review the final judgment rendered by that court.

OPINION DELIVERED IN COURT BELOW

The Court of Civil Appeals delivered an opinion that has been reported and that is cited as: Tom Benson

Chevway Rental & Leasing, Inc. v. Allen, 571 S.W.2d 346 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). Petitioner has appended a copy of the opinion to this petition. (App. B) The Supreme Court of Texas did not deliver an opinion.

JURISDICTIONAL STATEMENT

The Court of Civil Appeals rendered judgment on August 16, 1978. It overruled petitioner's timely filed motion for rehearing on September 13, 1978.

The Supreme Court of Texas refused petitioner's timely filed application for writ of error on December 6, 1978. It overruled petitioner's timely filed motion for rehearing of application for writ of error on January 17, 1979.

Petitioner's filing of this petition within 90 days after the Supreme Court of Texas overruled the motion for rehearing was timely. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 159-160 (1954). The statutory provision that confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, the lease between the parties is not a "consumer credit sale" under the Truth in Lending Act.

2. Whether, as a matter of law, Benson Leasing is not a "creditor" under the Truth in Lending Act.

STATUTE AND REGULATION INVOLVED IN THE CASE

The statute and regulation involved in the case are (1) the Truth in Lending Act, 15 U.S.C. §§ 1601, et

seq. (1970), and (2) Regulation Z, 12 C.F.R. § 226 (1976). The pertinent text of these provisions will be quoted in the argument amplifying the reasons relied on for the allowance of the writ.

STATEMENT OF THE CASE

1. The Nature of the Case

The respondents' claims arose under the Truth in Lending Act. The questions presented are statutory coverage questions involving construction of the Act and its application to lessors and leasing transactions. Petitioner's position is that, as a matter of law, the Truth in Lending Act does not apply to or cover it or the leasing transaction between the parties. The Courts below rejected petitioner's position. The trial court rendered judgment (TR 54; App. A) for respondents and against petitioner providing that respondents recover $1,000.00 and attorneys' fees as penalties for petitioner's violations of the Truth in Lending Act. The Court of Civil Appeals rendered judgment (App. C) affirming the trial court's judgment.

In this petition, we will refer to petitioner as "Benson Leasing" and to respondents as the "lessees."

2. The Facts Material to Questions Presented

A lease agreement made by Benson Leasing and the lessees on February 16, 1976, culminated the lessees' efforts to acquire a motor vehicle. (SF 1-6, 24-25) The parties executed writings to which they reduced the terms of the lease. (Defendant's Exhibits A and B) No writing existed to which the parties reduced any agreement that tended to amend, contradict, explain, supplement or modify the language contained in the

lease. (SF 26-28; TR 32-47, 48-53) Thus, the trial court appropriately found that the lease agreement was "the contract of the parties." (TR 64)

3. The Supreme Court's Jurisdiction

A. *Raising of federal questions in the courts below*

In the trial court, the parties raised the questions presented in their pleadings. (TR 1, 26) The lessees took the position that the Truth in Lending Act applied. Benson Leasing took the opposite position. The trial court agreed with the lessees, held the Act to be applicable, and rendered judgment for them and against Benson Leasing providing that they recover under the Act. (TR 54; App. A)

Benson Leasing appealed to the Court of Civil Appeals to reverse the judgment rendered by the trial court. In the appellate court Benson Leasing raised the questions presented in its original brief, at 3. The Court of Civil Appeals rendered judgment (App. C) affirming the judgment rendered by the trial court. It delivered an opinion (App. B) with the judgment in which it expressly passed on the questions presented by holding that Benson Leasing was a "creditor" and that the leasing transaction was a "consumer credit sale". Benson Leasing again raised these questions presented in its motion for rehearing, at 3, but the Court overruled it. (App. D)

Benson Leasing applied to the Supreme Court of Texas for the issuance of a writ of error to the Court of Civil Appeals upon which writ the Supreme Court could review the intermediate appellate court's judgment for errors. Benson Leasing raised the questions presented in its application, at 3. The Supreme Court

refused the application. (App. E) Benson Leasing again raised the questions presented in its motion for rehearing, at 2, but the Court overruled it. (App. E)

B. *Court of Civil Appeals as highest state court in which a decision could be had*

After the Court of Civil Appeals rendered the order overruling the motion for rehearing, Benson Leasing applied for the issuance of a writ of error from the Supreme Court of Texas to the Court of Civil Appeals. This Court requires petitioners to seek this kind of discretionary review by the highest state appellate court. *Banks* v. *California,* 395 U.S. 708 (1969); *Stratton* v. *Stratton,* 239 U.S. 55 (1915). Because the Supreme Court of Texas refused Benson Leasing's application for writ of error, the Court of Civil Appeals became the highest court of the state in which a decision could be had and this Court has jurisdiction to review its judgment, not the order refusing the application for writ of error. *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 676, 678 n. 1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 159-160 (1954).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Questions Presented Are Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

This Court must have recognized the importance of the Truth in Lending Act when it granted the writ of certiorari in *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), and should again recognize the importance of that Act, as amended by the Consumer Leasing Act of 1976, by granting the writ of

certiorari sought in this case. In that case, the Court acknowledged that:

> Passage of the Truth in Lending Act in 1968 culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy. . . .
>
> The Truth in Lending Act was designed to remedy the problems which had developed.

Mourning v. *Family Publications Service, Inc.*, supra, 411 U.S. 356, 363-364 (1973).

The development of problems continued. Not long after this Court decided the *Mourning* case, the Federal Reserve Board reported to Congress that it had "detected new problems relating to consumer leasing. Evidence gathered during the past year leaves little doubt that the business of leasing consumer durables has tremendous appeal and is subject to expanding interest by all manner of creditors including banks and subsidiaries of bank holding companies. Automobile manufacturers currently estimate that by 1980 some 40% of their production will be leased rather than sold." Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1973 (1974). The next year, the Board reported that "[t]he trend noted in last year's annual report concerning

lease arrangements being offered as alternatives to credit sales in connection with consumer durables has continued during 1974. . . . [C]onsumer leasing is becoming a more popular method of holding personal property . . . ." Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1974 (1975). In 1976, to show the need for the Consumer Leasing Act of 1976, the Committee on Banking, Housing and Urban Affairs of the United States Senate reported that "[t]he growth of personal property leasing by consumers has been rapid and substantial. The Federal Reserve testified as follows:

> 'Available statistics on the growth of consumer leasing indicate that the so-called 'big ticket durables,' such as automobiles, color television sets, and home furnishings are the most common goods leased by consumers. Automobiles presently constitute the most popular leased goods, and the aspect of consumer leasing will no doubt absorb much of the Subcommittee's attention during its deliberations on this legislation.
>
> Automobile leasing has experienced rapid growth over the past decade. According the statistics from the National Automobile Dealers Association, in 1965, more than 1.5 million, some 14 percent of the total number of automobiles produced, were leased, and one-fifth of this total was leased to individuals. By 1970, the percentage of automobile production that was leased had grown to 24 percent (2.6 million), more than a quarter of which represented leases to individuals. As of 1974, 2.8 million, about 26 percent of the total number of cars made, were leased, and 36 percent of this total was leased to individuals. Thus, over almost a decade, the percentage of total automobile production leased to individuals has tripled in size: from less than 3 percent in 1965 to 9.2 percent in 1974. Projections from automakers in Detroit, moreover, estimate

> that 80 percent of the growth in leasing through 1980 will be seen in leases to individuals.'

S. Rep. No. 590, 94th Cong., 2nd Sess., at 2 (1976). In deciding this case, the Court can clarify the relationship between the Truth in Lending Act and the Consumer Leasing Act of 1976, and prevent a vast number of persons, both lessors and lessees, from confronting the same problems the parties to this case confronted.

Furthermore, the Court now has the opportunity to decide some statutory coverage questions similar to one it expressly left open in the *Mourning* case. In that case one of the questions presented was whether, as a matter of law, the transaction involved an extension of consumer credit by respondent to petitioner within the meaning of the Truth in Lending Act. *Mourning* v. *Family Publications Service, Inc.*, supra, 411 U.S. 356, 362 n. 16 (1973). The Court decided that the respondent waived any error committed by the trial court in not rendering summary judgment for it, but Justices Douglas, Stewart, Rehnquist and Powell met the issue head on in their separate opinions. Mr. Justice Powell concluded that, as a matter of law, "there was no extension of consumer credit within the meaning of the Truth in Lending Act." 411 U.S. at 383.

2. The Decision by the Court Below Is Erroneous

a. *The leasing transaction in question is not a "consumer credit sale" under the Truth in Lending Act*

The cause of action under the Truth in Lending Act, 15 U.S.C. § 1640 (1970), consists of at least 2 elements, both of which the Act defines. One of the elements that the lessees must prove is that the leasing transaction between the parties is, as defined by the Act, a "consumer credit sale."[1] This element involves what some people call a "transactional" concept, as distinguished from a "status" concept such as the one involved in the inquiry relating to whether or not Benson Leasing is a "creditor" under the Act. The term "consumer credit sale" derives its meaning from several provisions defining these terms:

(1) "consumer," 15 U.S.C. § 1602(h) (1970);

(2) "credit," 15 U.S.C. § 1602(e) (1970);

(3) "consumer credit," Regulation Z, 12 C.F.R. § 226.2(p) (1976); and

(4) "credit sale," 15 U.S.C. § 1602(g) (1970).[2]

The definitions of "credit" and "credit sale" are significant to the question presented as to whether or not

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[1] This element is made an element of the cause of action by these provisions:

(1) Truth in Lending Act § 121(a), as amended, Pub. L. No. 93-495, § 307(c), 88 Stat. 1516 (1974), 15 U.S.C.A. § 1631 (a) (Supp. 1978) ("Each creditor shall disclose . . . to each person to whom consumer credit is extended . . . the information required under this part");

(2) Title 15 U.S.C. § 1638(a) (1970) ("In connection with each consumer credit sale . . . the creditor shall disclose"); and

(3) Regulation Z, 12 C.F. R. § 226.8 (1976).

[2] "The adjective 'consumer', when used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is . . . extended is a natural person, and the . . . property . . . which [is] the subject of the transaction [is] primarily for personal, family, household or agricultural purposes." 15 U.S.C. § 1602(h) (1970). "'Consumer credit' means credit . . . extended to a natural person, in which the . . . property which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes. . . ." Regulation Z, 12 C.F.R. § 226.2 (p) (1976).

the lease is a "consumer credit sale" under the Act. "The term 'credit' means the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e) (1970). "The term 'credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a . . . lease if the . . . lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved and it is agreed that the . . . lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract." 15 U.S.C. § 1602(g) (1970). Benson Leasing must call the Court's attention to the definition of the term "consumer lease," which should be contrasted with the term "credit sale." Under the Consumer Leasing Act of 1976, "[t]he term 'consumer lease' means a contract in the form of a lease . . . for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, *except such term shall not include any credit sale* as defined in section 1602(g) of the title." 15 U.S.C.A. § 1667(1) (Supp. 1978) (Emphasis supplied.).

These definitions are not significant to the questions presented because the lessees are natural persons and at the time of the transaction they intended to use the automobile for personal purposes.

The difference between the two terms is very important. A lease *with* a nominal purchase option is subject to the Truth in Lending Act if it otherwise meets the definition of "consumer credit sale." On the other hand, a lease *without* a purchase option is not subject to the Truth in Lending Act, but is subject to the Consumer Leasing Act of 1976 if it otherwise meets the definition of "consumer lease." Both of these terms may, however, apply to transactions involving acquisition of personal property by a natural person for a period exceeding four months, for personal use, and for a debt less than $25,000. Congress did, of course, intend the terms to be mutually exclusive concepts. Otherwise, a transaction which happened to resemble both might be subject to two conflicting disclosure requirements. As Congressman M. Caldwell Butler pointed out during the debate on the Consumer Leasing Act of 1976, the lessor is in a dilemma. If he should comply with the Truth in Lending Act but instead complies with the Consumer Leasing Act of 1976, he loses his case. Likewise, if he should comply with the Consumer Leasing Act of 1976 but instead complies with the Truth in Lending Act, he loses his case. 121 Cong. Rec. 10309-10314, E 5636 (1975).

The leasing transaction between the parties is not a consumer credit sale under the Truth in Lending Act. The transaction is, however, apparently within the scope of the Consumer Leasing Act of 1976, but that Act did not become effective until over a year after the parties signed the lease. The lease is not a consumer credit sale for two reasons: one, the lessees did not have

an option to buy; and two, Benson Leasing did not extend any credit to lessees. Let us turn to a discussion of these two reasons.

In the first place, the lease is not a credit sale because Benson Leasing and the lessees did not agree that they had the option to become the owner of the automobile. Indeed, the lease agreement is clearly inconsistent with a purchase option. The lease form is denominated as a motor vehicle lease. Benson Leasing is designated throughout as lessor and Mr. Allen as lessee. Lessees agreed to pay rental payments. They agreed not to assign or sublet the automobile. Benson Leasing reserved the right to attach a notice to the automobile to protect or to disclose its interest. Lessees agreed that they would use or permit use of the automobile only within the Continental limits of the United States or Canada. They agreed to promptly notify Benson Leasing in writing of any change of the place of permanent garaging of the automobile. In paragraph 14, the parties made this agreement:

> 14. Ownership: Lessee acknowledges that it does not have and will not obtain any title or equity to the Vehicle at any time during the term of Lease, nor any property right or interest, real or implied, except solely the right to use and operate it as Lessee hereunder and subject to all terms hereof and that as between Lessor and Lessee, the Lessor has the entire title to the Vehicle.

The lessees also agreed that, upon termination of the lease, they would return the vehicle to Benson Leasing at its place of business. Furthermore, the parties agreed that: "This instrument and any or all supporting documents attached hereto by specific reference constitute the entire understanding of the parties with respect to the subject matter hereof."

The Court below changed the written understanding of the parties by adding a purchase option to the lease.

Confronted with the terms of the contract, this Court must conclude that it is a lease and not a credit sale. The opinions of the staff of the Federal Reserve Board are consistent with this conclusion. In FRB Letter No. 877 (February 28, 1975), the Board's staff was asked whether a lessor needed to give Truth in Lending disclosures in connection with certain automobile leases. The staff responded to the request:

> You indicate that the lease plan in question does not specifically give the consumer an option to purchase the leased commodity but neither does it forbid him to bid at any subsequent sale of the auto following termination of the lease.
>
> Truth in Lending's application to consumer leases is invoked by the definition of the term "credit sale" contained in § 226.2(n) of Regulation Z [(1976); § 226.2(t) (1978)]. Therein "credit sale" is defined to include any contract in the form of a lease in which the lessee has an option to purchase the leased commodity and the purchase price is nominal. *This staff views the option to purchase referenced in the regulation to be a "contracted-for" term.* Therefore, we would not regard a lessee's possible participation in an auction of an automobile to be a bona fide option to purchase. Consequently, we do not view the lease referenced in your letter as being subject to Truth in Lending disclosures. (Emphasis Supplied.)

Then, over two years later, the Staff issued an official interpretation pursuant to Regulation Z, § 226.1(d)(3).[3] The pertinent parts of the interpretation are:

> This is in reply to your letter * * * requesting an official staff interpretation concerning several provisions of Regulation Z which implement the Consumer Leasing Act.
>
> Your first question concerns the meaning of the term "option to purchase" as it is used in § 226.15(b)(11). Your client's vehicle lease agreement provides that upon termination of the lease, the realized value of the lease property shall be ascertained by a professional appraisal or by a bid procedure whereby the lessor procures several cash bids for the purchase of the vehicle, with the highest bid being deemed the realized value. The lease agreement provides that the lessee has a right to submit a cash bid for the purchase of the vehicle and that such bid shall receive the same consideration as any other bid. This right to bid is also provided by statute in your State. You note that the lessee's right to bid does not place the lessee in a position in any way superior to that of other bidders, that none of the bids submitted by persons other than the lessees are subordinate to the lessee's bid, and that the lessee has no right to and does not receive any information from the lessor regarding the amounts of other bids submitted. You ask whether the lessee's right to bid as described is an "option to purchase" within the meaning of § 226.15(b)(11).

[3] These staff opinions, "though not binding on the Court, are entitled to great weight, for they constitute part of the body of 'informed experience and judgment of the agency to whom Congress delegated appropriate authority.'" *Philbeck* v. *Timmers Chevrolet Co., Inc.*, 449 F.2d 971, 976 (5th Cir. 1974).

> It is staff's opinion that the lessee's right to submit a bid as described above does not constitute an "option to purchase" within the meaning of § 226.15(b)(11). This opinion is based on the fact that the lessor is not required to accept the lessee's bid and the lessee is in no better position than the other bidders.

FRB Official Staff Interpretation No. FC-0112, 42 Fed. Reg. 53948 (September 13, 1977).

The transaction in question should be given the same treatment as the transactions described in the Staff opinions. The transaction is a lease, and not a lease with an option to purchase, and the Court should so hold.

In the second place, Benson Leasing did not extend any credit to lessees because they paid in advance for each period of use of the vehicle.[4] Compare *Mourning* v. *Family Publications Service, Inc.*, supra, 411 U.S. 356, 378-389 (1973) (Douglas, Stewart, Rehnquist and Powell, J. J., dissenting), with *Munson* v. *Orrin E. Thompson Homes, Inc.*, 395 F. Supp. 152, 155-157 (D. Minn. 1974). In the *Mourning* case, the four justices who addressed the issue of whether or not the magazine distributor extended credit to the subscriber agreed with Professor Corbin's statement that: "A transaction may be an installment contract without being a credit transaction at all. Both parties may agree to perform in installments without promising to render any performance in advance of full payment of the price of each installment so rendered." 411 U.S. at 380 n. 4, 384-385. The majority seemed to have the same opinion, see 411 U.S. at 362 n. 16, as does the staff of the

[4] Defendant's Exhibit A, the Motor Vehicle Lease, paragraph 2, provides: "Rental: Lessee shall pay to Lessor . . . rent . . . in advance . . . ."

Federal Reserve Board. FRB Letter No. 701 (July 31, 1973).

Mr. Justice Powell specifically focused on leases in his dissenting opinion in the *Mourning* case:

> In earlier versions of the Act, the definition of credit included "any contract . . . of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract; . . . any contract or arrangement for the hire, bailment, or leasing the property . . . ." S. 1740, 87th Cong., 1st Sess.; S. 5, 90th Cong., 1st Sess. (as introduced Jan. 11, 1967). During the Senate hearings, a question was raised as to whether any finance charge would be attributable to certain included transactions, particularly ordinary bailment and lease arrangements. Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 663 (1967) (statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System). This criticism was heeded and the final version of the bill substituted the language now found in the Act (15 U.S.C. § 1602(e)) with the following explanation: "The original S. 5 language was deleted because it was somewhat cumbersome and sweeping and referred to various types of lease situations which might not be true extensions of credit." S. Rep. No. 392, 90th Cong., 1st Sess., 12 (1967). In fact a lease, like the "paid during service" magazine contracts offered by respondent, often imposes a noncancellable obligation on the lessee or consumer to pay in a series of installments. Yet the lessor does not extend credit because the lessee ordinarily pays in advance for each period during which he enjoys the use of the property. Petitioner, by the same reasoning, was no more the recipient of credit than is the ordinary lessee or bailee. It would be inconsistent with this legislative history to read "extension of credit" to include every noncancellable installment obligation.

411 U.S. at 386 n. 4. These opinions fully support Benson Leasing's position that it extended no "credit" to the lessees within the meaning of the Act.

The Court should therefore hold that, as a matter of law, the Truth in Lending Act does not apply to or cover the leasing transaction between the parties.

b. *The Consumer Leasing Act of 1976 closes the loophole*

The court below disregarded established rules of statutory construction in reaching its conclusion that the Truth in Lending Act applies to the leasing transaction.

In construing statutes, this Court has given instructions to "turn first to the language of [the statute], for '[t]he starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976). Although the Court will not strictly or narrowly construe the Act, *Mourning* v. *Family Publications Service, Inc.,* supra, 411 U.S. 356, 375-376 (1973), its "judicial function [is] to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Ry. Co.,* 343 U.S. 562, 575 (1952). Definitions are part of what Congress wrote in the Act. 15 U.S.C. § 1602 (1970). Regulation Z, 12 C.F.R. § 226.1(a) (1976), even specifically provides that it "applies to all persons who are creditors, as *defined* in paragraph (s) of § 226.2." (Emphasis supplied.) To *define* means "to fix, decide, or

prescribe, clearly and with authority; to mark the limits: determine with precision or exhibit clearly the boundaries of; to make distinct in outline or features; to discover and set forth the meaning of." Webster's Third International Dictionary (1966). The expressed intent of Congress is, then, to limit the application of the Act to those persons and transactions it defines. See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970). Congress could well have used broader words for the purpose of covering all lessors and leasing transactions. See *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Indeed, as Mr. Justice Powell pointed out, the early drafts of the Truth in Lending Act contained a provision that imposed liability on "any person who . . . rents property . . . on [an] installment basis . . . ." S. 750, 88th Cong., 1st Sess., § 3(4) (1963). And, as he noted, in earlier versions of the Act, the definition of "credit" included "any contract or arrangement for the hire, bailment, or leasing of property . . . ." S. 1740, 87th Cong., 1st Sess. (1961); S. 5, 90th Cong., 1st Sess., ¶ 3(2) (1967). But Congress expressly rejected this proposal when "[t]he original S. 5 language was deleted because it was somewhat cumbersome and sweeping and referred to various types of lease situations which might not be true extensions of credit." S. Rep. No. 392, 90th Cong., 1st Sess., 12 (1967).

True enough, this Court must be guided by the purpose Congress expressed in the Act, 15 U.S.C. § 1601 (1970). But since "[t]he legislature does not . . . merely enact general policies," *Moragne* v. *States Marine Lines, Inc.*, supra, 398 U.S. 375, 392 (1970), those general policies or purposes do not give this or any other court a charter for extending the laws beyond their domain simply because a similar policy seems to apply to Benson Leasing or the leasing transaction in

question. See *McBoyle* v. *United States*, supra, 283 U.S. 25, 27 (1931). As Judge Learned Hand once said, "the notion that the 'policy of a statute' does not inhere as much in its limitations as in its affirmations, is untenable." *Borella* v. *Borden Co.*, 145 F.2d 63, 65 (2d Cir. 1944), aff'd, 325 U.S. 679 (1945).

It may even be true that if the Court read the language of the Act in a vacuum, the result would not be clear; i.e., some doubt may be left as to the lessors and leasing transactions Congress intended it to cover. But, as we shall see, the language of these statutes does not stand alone and should not be construed as though it does.

Although the Truth in Lending Act, § 105, 15 U.S.C. § 1604 (1970), provides that the Federal Reserve Board "shall prescribe regulations [which] in the judgment of the Board are necessary or proper to . . . prevent circumvention or evasion [of the purposes of the Act]," the Board recognized that the Act did not apply to or cover many leasing transactions and that it could not extend the scope of the Act by regulation.[5] "[N]ot infrequently administration [of legislation introducing a new system] reveals gaps or inadequacies of one sort or another that may call for amendatory legislation." *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944). Thus, in its Annual Report

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[5] Contrast the Board's position that it could not extend the scope of the Act to cover lessors and leases with its position that it could extend the scope of the Act by promulgation of that portion of Regulation Z, commonly referred to as the "Four Installment Rule," 12 C.F.R. § 226.2(k) (1978). This Court upheld the Board's authority to extend the scope of the Act by that rule. *Mourning* v. *Family Publications Service, Inc.*, supra, 411 U.S. 356, 361-374 (1973).

to Congress on Truth in Lending for the Year 1973 (1974), the Board reported:

> . . . Section 103(g) [of the Act, 15 U.S.C. § 1602 (g) (1970)] clearly brings certain of these disguised leases into the disclosure sweep of the Act through the definition of "credit sale." However, the language of the definition is specific only with respect to those leases which contain provisions for the lessee to become the owner of the goods leased "for no other or a nominal consideration." Consequently, the Act's application to those leases which do not contain an option to purchase is unclear. This is so despite the fact that in many cases these so-called . . . leases may place nearly all the burdens of ownership on the "consumer lessee" without the benefit of adequate cost disclosures. For example, a consumer might enter into what he believes to be a simple two-year automobile lease without clear and conspicuous disclosures, such as that the lease contract makes him responsible for the resale value of the car and that he may be obligated for what is equivalent to a large undisclosed balloon payment.
>
> In light of these factors, the Board believes that consumer leasing programs need to be accompanied by adequate cost disclosures . . . . In this regard, the lease disclosure provisions presently contained in the Uniform Consumer Credit Code appear to go a long way in ensuring adequate disclosure and liability safeguards for the consumer.

Again, in its Annual Report to Congress on Truth in Lending for the Year 1974 (1975), the Board reported:

> III. RECOMMENDATIONS
>
> *Consumer Leasing Disclosures*
>
> The trend noted in last year's annual report concerning lease arrangements being offered as alternatives to credit sales in connection with consumer durables has continued during 1974. The basic concern of the Board is not that consumer leasing is becoming a more popular method of holding personal property, but that there are no effective cost disclosure requirements governing these lease alternatives. This concern is also shared by the Comptroller of the Currency.
>
> Presently, the Truth in Lending Act has potential application only to those leases which contain an option to purchase the leased product by the lessee and in which the purchase price under that option is nominal. Many consumer leases currently available do not include an option to purchase; nonetheless, under their terms the lessee is responsible for the value of the commodity leased at the end of the lease term. As such, these leases place nearly all of the burdens of ownership on the consumer lessee without the benefit of title or adequate cost disclosures. For example, an automobile lessor in Connecticut advertised rental payments on a new car which were considerably lower than comparable installment payments under a credit sales arrangement, claiming that it was cheaper to lease the car than to purchase it on credit . . . . The lease advertisement . . . did not fully inform the lessee of the extent of his liability for the residual value of the automobile at the end of the lease term. Since the monthly rental payments may not account for the expected depreciation in the value of the car during the two year lease, the consumer may be obligated for an amount equivalent to an undisclosed balloon payment in a credit sales contract.
>
> In light of these practices, the Board recommends that Congress consider enacting disclosure provisions for consumer leasing which would require aggregate cost disclosures in lease advertising and at the time the lease is consummated, regardless of whether the lessee has a purchase option under the lease. The Board considers these

disclosures to be essential if consumers are to intelligently compare lease arrangements and competing credit sale transactions. The provisions of the recommended legislation (which is attached as Appendix B) generally mirror Truth in Lending disclosure requirements and incorporate some of the leasing requirements of the Uniform Consumer Credit Code.

An important aspect of the proposed legislation would be the placing of some limitation on the consumer's liability for the residual value of the leased commodity where its value falls below the depreciated value stated in the contract. Presently, not only is there no requirement that such liability be disclosed, but, because it is dependent upon the residual value of the goods leased, the amount of such liability can be highly uncertain. Consequently, at the end of a lease, a consumer may find himself liable for a large final payment for which he had no earlier warning. Thus, the lease takes on many of the characteristics of a credit sale, but with an uncertain price that will depend on conditions that exist at the end of the contract. To alleviate this problem, a consumer's final liability could be limited. For example, such final liability might be limited to twice or three times the amount of the average monthly payment under the lease or by some other formula devised by Congress.

The Board's proposed legislation covering lessors and leasing transactions was quite unnecessary if the Truth in Lending Act already covered installment transactions, such as the leasing transaction in question.

Eventually, Congress also recognized that new legislation was needed to cover lessors and leases. As Congressman Chalmers P. Wylie put it during the debate on the Consumer Leasing Act of 1976, "We found it necessary to undertake to write a bill like this to close

—and I use the word advisedly—what was determined to be a loophole in the truth-in-lending bill." 121 Cong. Rec. H 10310 (1975). Thus, in S. Rep. No. 590, 94th Cong., 2nd Sess. 1-5 (1976), the Senate Committee on Banking, Housing and Urban Affairs reported:

> In its 1974 Annual Report the Federal Reserve Board pointed out that the existing Truth in Lending Act had no application to leases (other than leases with an option to purchase at a nominal price).
>
> • • •
>
> For the individual consumer, the lease may be an attractive way to acquire the use of goods on an installment plan where the monthly "rentals" are low, thus requiring a smaller cash flow. The long-term lease is therefore an alternative to traditional sales financing. Yet the Truth in Lending Act's careful and thorough disclosure requirements do not apply to any lease unless it contains an option to purchase at no, or a nominal, additional cost. The bulk of current leases either have no purchase option or involve much more than a nominal extra cost, and so do not contain all of the information a consumer needs to make an intelligent comparison between leases, or between the lease and a credit purchase . . . .
>
> The need for useful comparative information is heightened by the fact that one of the common forms of open-end leases with which this Committee is concerned is the so-called "net" or "finance" lease which guarantees the lessor a specified return, or guarantees him in whole or in part against loss of income. This type of lease is the most widely used form of lease for motor vehicles. Under such a lease, the lessor contracts with a lessee that the lessee meet monthly rental payments which are designed both to reimburse the lessor for the reduction in market value of his vehicle (i.e., de-

preciation) and to provide him with a specified return.

At the expiration of such a lease, the vehicle is sold. If the vehicle is sold for less than its depreciated value, as originally estimated, the lessee is responsible for reimbursing the lessor for the difference between this value and the sales price. Conversely, if the vehicle is sold for more than such depreciated value, the lessee receives the excess as a retrospective adjustment in rent. Most lessors offer this form of lease because the lessee or user holds possession and control of the leased vehicle and, through adequate or inadequate maintenance, has the power to enhance or reduce the value of such leased property.

It is possible under such a lease arrangement, however, to set the periodic specified rents so low during the lease term that a substantial deficiency is destined to result. If so, and the lessee is not apprised of this distinct probability, the lessee will not be cognizant of the full extent of his lease obligations. Governor Bucher of the Federal Reserve Board described a typical transaction and the danger it presents:

> For example a typical two-year auto lease on a $5,400.00 car might call for 24 $100 installment payments and set an end-term depreciated value of $3,000 on the car. Under such an agreement, the lessee may have no understanding of how much the lease may cost, unless he can accurately predict the secondhand market value of the product. For example, in this case, the depreciated value of the car might be $2,500, which under the lease contract would leave the lessee liable for an additional $500.00 balloon payment. Thus, if the contract sets an unrealistically high depreciated value of the leased goods, the contingent liability of the lessee will increase accordingly, and the lessor can offer deceptively low monthly rental payments to an unwary public.

* * *

EXPLANATION OF THE LEGISLATION

Scope of the Act

* * *

> With . . . qualifications, the Act applies to any lease or bailment agreement respecting personal property, whether that lease or bailment is for a fixed term or on a renewable basis, and whether the agreement is straight lease (where the lessee simply surrenders the goods at the end of the term) or a so-called financing lease (where the lessee's obligation is to pay the full market value of the leased goods). Those occasional leases which include an option to purchase at no or a nominal extra charge are left subject to the Truth in Lending Act, however, on the theory that they are closer equivalents to credit sales and ought to include finance charge and annual percentage rate disclosures.

* * *

The United States Congress enacted, therefore, the "Consumer Leasing Act of 1976," Pub. L. 94-240, § 3, 90 Stat. 257 (1976) (to be codified at 15 U.S.C. §§ 1601, 1667, et seq.) (Effective March 23, 1977).

Benson Leasing's position on the question presented is obviously bolstered by the enactment of the Consumer Leasing Act of 1976, which makes clear distinctions between consumer leases and consumer credit sales. This Court cannot escape the conclusion that Congress had in mind the very leasing transaction here in question when it enacted that Act. The leasing transaction in question *is not* subject to the Truth in Lending Act. It *is*, however, within the scope of the Consumer Leasing Act of 1976. To hold to the contrary, this Court

must disregard the language of the Truth in Lending Act, and the Consumer Leasing Act of 1976, and it must disregard the available legislative history for those statutes, including the Board's reports to Congress, and its amendments to Regulation Z. Moreover, to hold to the contrary would be to judicially legislate instead of to judicially construe, for, although "the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' . . . To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation." *Addison* v. *Holly Hill Fruit Products,* supra, 322 U.S. 607, 618 (1944).

The Court must, therefore, conclude that the Truth in Lending Act does not, as a matter of law, apply to the lease transaction.

c. *Benson Leasing is not a "creditor" under the Truth in Lending Act*

The second element that the lessees must prove is that Benson Leasing is, as defined by the Act and Regulation Z, a "creditor."[6] *Gerlach* v. *Allstate Insurance*

[6] This element is made an element of the cause of action by these provisions:

(1) Truth in Lending Act § 121(a), as amended, Pub. L. No. 93-495, § 307(c), 88 Stat. 1516 (1974), 15 U.S.CA. § 1631 (a) (Supp. 1978) ("Each creditor shall disclose");

(2) Truth in Lending Act § 130(a), as amended, Pub. L. No. 93-495, § 408(a), 88 Stat. 1518 (1974), 15 U.S.C.A. § 1640 (a) (Supp. 1978) ("any creditor who fails to comply . . . is liable");

Co., 338 F. Supp. 642, 647 (S.D. Fla. 1972); see *Mourning* v. *Family Publications Service, Inc.,* 449 F.2d 235, 240 (5th Cir. 1971), rev'd on other grounds, 411 U.S. 356 (1973).

The term " 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four installments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise." Regulation Z, 12 C.F.R. § 226.2(s) (1976); accord, 15 U.S.C.A. § 1602(f) (Supp. 1978). Thus a person may be a *creditor* if he is a consumer credit "extender," "arranger," or "offeror." In their petition (TR 3, ¶ VI), the lessees only pleaded that Benson Leasing was a consumer credit "extender." They did not, then, raise any issue as to whether or not Benson Leasing was a consumer credit "arranger" or "offeror."[7]

To prove that Benson Leasing is a consumer credit extender, the lessees must prove that it is a person who,

(3) Regulation Z, 12 C.F.R. § 226.1(a) (1976); and

(4) Regulation Z, 12 C.F.R. § 226.8(a) (1976).

[7] Before going further, the definition of "lessor" in the Consumer Leasing Act of 1976 § 3(3), 15 U.S.C. § 1667(3) (Supp. 1978), should be compared with the definition of "creditor": "The term 'lessor' means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease." The definition of "lessor" is almost as interlocking as the definition of "creditor" since the term "consumer lease" is also defined. Consumer Leasing Act of 1976 § 3(1), 15 U.S.C.A. § 1667 (1) (Supp. 1978).

(1) in the ordinary course of its business, (2) regularly (3) extends (4) consumer credit[8] (5) which is payable by agreement in more than four installments, or for which the payment of a finance charge[9] is or may be required (6) in connection with credit sales.[10]

When the transaction between the parties occurred, Benson Leasing sold vehicles on occasion but very un-

[8] "The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is . . . extended is a natural person, and the . . . property . . . which [is] the subject of the transaction is primarily for personal, family, household, or agricultural purposes." 15 U.S.C. § 1602(h) (1970).

"The term 'credit' means the right granted by a creditor to a debtor to defer payment of a debt or incur debt and defer its payment." 15 U.S.C. § 1602(e) (1970).

Then the term " 'consumer credit' means credit . . . extended to a natural person, in which the . . . property . . which is the subject of the transaction, is primarily for personal, family, household, or agricultural purposes." Regulation Z, 12 C.F.R. § 226.2 (p) (1976).

[9] " 'Finance charge' means the cost of credit determined in accordance with [Regulation Z, 12 C.F.R.] § 226.4." Regulation Z, 12 C.F.R. § 226.2(w) (1976).

[10] The term " 'Credit sale' means any sale with respect to which consumer credit is extended . . . by the seller, The term includes any contract in the form of a . . . lease if the . . . lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property . . . involved and it is agreed that the . . . lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract." Regulation Z, 12 C.F.R. § 226.2(n) (1976); accord Regulation Z, 12 C.F.R. § 226.2(t) (1978); 15 U.S.C. § 1602(g) (1970).

commonly at retail, as opposed to wholesale (SF 44).[11] This fact does not help the lessees, however, because it fails to show that Benson Leasing engaged in retail *credit* sales under the Act (as distinguished from retail *cash* sales or from retail credit sales not under the Act because, for example, the credit is payable in less than four installments or no finance charge is made). Furthermore, this fact fails to show that in the ordinary course of its business, Benson Leasing regularly sold property to "natural persons" (as distinguished from "organizations," 15 U.S.C. § 1602(c) (1970)), or to natural persons who used the property primarily for personal, family, household or agricultural purposes (as distinguished from natural persons who used the property primarily for commercial or business purposes).

Just before the transaction in question occurred, Benson Leasing advertised in a local newspaper sixteen of its repossessed or returned cars for sale *or lease* and stated that complete financing was available. Reliance on this advertisement was misplaced, however, because it did not say that Benson Leasing would "extend" the financing (as distinguished from "arrange" for financing). Moreover, it did not say that the "financing" would be payable by agreement in more than four installments or that payment of a finance charge would be required, or that it was otherwise within the scope of the Act.

[11] "Retail" means, of course, "to sell directly to the ultimate consumer" or "the sale of commodities or goods . . . to ultimate consumers—opposed to wholesale." "Wholesale" means "the sale of goods . . . usually for resale." Webster's Third New International Dictionary (1966).

This Court should hold that the Truth in Lending Act does not apply to Benson Leasing because, as a matter of law, Benson Leasing is not a "creditor" under the Act.

CONCLUSION

The Court should reverse the judgment rendered by the Court of Civil Appeals on the cause of action arising under the Truth in Lending Act, or vacate it in light of the enactment of the Consumer Leasing Act of 1976, and remand the case to the Court of Civil Appeals with instructions to render a take-nothing judgment against respondents on the cause of action arising under the Truth in Lending Act or with instructions to reconsider the case in light of the Consumer Leasing Act of 1976, and with instructions to remand the remainder of the case to the trial court for further proceedings on questions of state law not inconsistent with the Court's decision on questions of federal law.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE DISTRICT COURT
57TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

No. 76CI-13444

KENNETH WAYNE ALLEN AND WIFE, DOLORES ALLEN

v.

TOM BENSON CHEVWAY RENTAL & LEASING, INC. (TOM BENSON LEASING, INC.) AND CLIFF DOWD, INDIVIDUALLY AND d/b/a PADGETT'S USED CARS

Judgment

On the 9th day of March, 1977, the above cause was heard upon its merits. Plaintiffs appeared in person and by their attorney of record and announced ready for trial. Defendant, Tom Benson Chevway Rental & Leasing, Inc. appeared by its general manager, Butch Howard, and its attorney of record and announced ready for trial. Defendant, CLIFF DOWD, individually and d/b/a PADGETT'S USED CARS did not appear, an Interlocutory Default Judgment having been rendered on the 29th day of December, 1976, against that Defendant in the amount of $2,960.00 for violation of the Texas Consumer Credit Code plus attorneys fees to be determined at the trial of this cause upon its merits.

No jury having been demanded by any party, this cause was presented to the Court. After hearing the presentation of the testimony, evidence, and argument of counsel, the Court finds that in the course of the transaction, Defendants violated the Texas Consumer Credit Code.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Judgment should be and is hereby rendered in favor of Plaintiffs against Defendants jointly and severally in the

amount of $2,960.00, for violations of the Texas Consumer Credit Code.

The Court further finds that in the course of the transaction, Defendant, Tom Benson Chevway Rental & Leasing, Inc. violated the Federal Truth In Lending Act and Federal Reserve Regulation Z.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Judgment should be and is hereby rendered in favor of Plaintiffs and against Tom Benson Chevway Rental & Leasing, Inc. in the amount of $1,000.00 for violation of the Federal Truth In Lending Act and Federal Regulation Z.

It having been stipulated in open court that the sum of $700.00 is a reasonable attorneys' fee for the services that have been rendered to Plaintiffs by their attorneys;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby rendered in favor of Plaintiffs, against Defendants, jointly and severally in the amount of $700.00.

The Court further finds Tom Benson Chevway Rental & Leasing, Inc. is entitled to possession of the 1975 Plymouth Gran Fury, License Number LNS 809 as prayed for in the First Amended Original Answer by Tom Benson Chevway Rental & Leasing, Inc.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Tom Benson Chevway Rental & Leasing, Inc. recover possession of the motor vehicle and that upon this Judgment becoming final a Writ of Possession issue directing any sheriff or constable to take possession of the above motor vehicle and deliver possession to Tom Benson Chevway Rental & Leasing, Inc.

Costs of this suit are taxed against Defendants, all of which let execution issue if not timely paid.

Any relief not herein specifically granted is hereby expressly denied.

The Court notes the exception to this judgment by Tom Benson Chevway Rental & Leasing, Inc.

SIGNED this 1st day of April, 1977.

/s/ FRANKLIN S. SPEARS
Judge Presiding

Approved As To Form:

/s/ DON KRAUSE
Don Krause
Bayne, Snell & Krause
603 Broadway National Bank Building
San Antonio, Texas 78209

Carl Robin Teague
711 Navarro, Suite 620
San Antonio, Texas 78205

APPENDIX B

COURT OF CIVIL APPEALS
EL PASO

No. 6718

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant,*

v.

KENNETH WAYNE ALLEN, ET UX., *Appellees.*

Appeal from 57th District Court of Bexar County, Texas.

Opinion

This is a suit under the Texas Consumer Credit Code and the Federal Truth-in-Lending Act involving the acquisition of an automobile by Appellees from Appellant. The trial Court, sitting without a jury, found violations of both Acts and awarded judgment to Appellees. The principal question involved is whether the two Acts apply to the transaction between Appellant and Appellees because of the nature of that transaction. We affirm the judgment of the trial Court.

Appellees, Kenneth Allen and wife, Dolores Allen, brought suit against Appellant alleging violations of the Truth-in-Lending Act, 15 U.S.C.A. Sec. 1601, et seq., Regulation Z, 12 C.F.R. Sec. 226.1, et seq., and Chapter 7 of the Texas Consumer Credit Code, Art. 5069-7.01, et seq., Tex. Rev.Civ.Stat.Ann. One Cliff Dowd, d/b/a Padgett's Used Cars, was also named as a party Defendant, and he defaulted. The trial Court entered judgment jointly and severally awarding Appellees judgment in the amount of $2,960.00 for violations of the Texas Consumer Credit Code, and $1,000.00 for violation of the Federal Truth-in-Lending Act and Regulation Z, plus $700.00 attorney's fees. The Court found that Appellant was entitled to possession of

the car involved in the transaction. Cliff Dowd, d/b/a Padgett's Used Cars, does not appeal.

On February 10, 1976, Appellee, Kenneth Allen, entered into a written contract to purchase a 1975 Plymouth from Padgett's Used Cars. He paid $700.00 cash and also executed two other instruments; their interpretation is involved here. All of the Appellee's dealings were with Padgett's Used Cars, but these two instruments are between Appellee and Tom Benson Chevway Rental and Leasing, Inc., being executed by them as well as Appellee. One of the instruments is entitled "Motor Vehicle Lease" and the other is entitled "Finance Lease Addendum," and the trial Court found these two instruments together to be the contract between Appellant and Appellee. Appellant asserts that this is a lease transaction, and the Texas Consumer Credit Code, the Truth-in-Lending Act, and Regulation Z do not apply. If these Acts are applicable, there were many violations of them, and Appellant does not contend otherwise. The question, then, is whether or not the Acts are applicable.

To invoke the Truth-in-Lending Act and Regulation Z, four conditions must be satisfied:

> "* * * First, there must be a 'creditor'—one who regularly extends or arranges for the granting of consumer credit. Second, the debtor must be a natural person. Third, the transaction must be a 'consumer credit transaction' consisting of three component characteristics: (1) it must be a credit transaction; (2) it must require the payment of a finance charge *or* be payable in more than four installments; and, (3) it must be conceived for a consumer or agricultural purpose. Finally, the credit extension must not come within the statutory exemptions * * *." Boyd, "Consumer Law," 8 Tex.Tech.L.Rev. 1077 (1977).

Appellant contends that there is an absence of two of these controlling issues; that is, that the transaction between the

Appellee, Kenneth Allen, and Appellant was not a consumer credit sale, and that the lessor was not a creditor. The trial Court found that the transaction between the parties was a "credit sale" as defined by Section 226.2(n) of Regulation Z, which states in part:

> "(n) 'Credit sale' means any sale with respect to which consumer credit is extended or arranged by the seller. The term includes any contract in the form of a * * * lease if the * * * lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the * * * lessee * * * for no other or for a nominal consideration has the option to become * * * the owner of the property upon full compliance with his obligations under the contract."

On the same day that Appellee contracted for this automobile, the Appellant advertised it for sale in the newspaper for a price of $4,620.00. In addition to the $700.00 which Appellee paid to Padgett's Used Cars, the Lease Addendum instrument which he signed obligated him to pay to Appellant 36 monthly installments of $150.00 each. These installments totalled $5,400.00. This Finance Lease Addendum provided that at the end of 36 months, the book value of the car would be $1.00. And it had this provision:

> "Lessee may sell vehicle or Lessor may sell it at termination of lease. Proceeds over book value remitted 100% to lessee; any deficiency under book value is assumed by Lessee."

Thus, we see that Appellee for the merely nominal consideration of $1.00 had the option of becoming the owner of the motor vehicle upon full compliance with the provisions of the lease. Also, Appellee contracted to pay as compensation for use of the automobile a sum substantially equivalent to, or in excess of, the value of the vehicle. The instruments involved were the printed forms of Appellant, so it is charged with extending or arranging for the consumer credit involved under the above definition. We think that the trial Court correctly found that the transaction between the parties was a credit sale within the meaning of the above definition under Regulation Z.

Appellant asserts that there was no finding by the trial Court that it was a "creditor" within the meaning of the Truth-in-Lending Act. It urges that there can be no implied finding to support the Court's judgment because Appellant duly made a request for findings of fact pursuant to Rule 296, Tex.R.Civ.P. We cannot agree, and hold that implied findings may be made for the reason that Appellant did not object to the findings of the trial Court or request additional findings under the provisions of Rule 298, Tex.R.Civ.P. Such an implied finding is in order under the evidence. In addition to the above terms of the contract whereby Appellee was obligated to pay the sum of $5,400.00 in 36 monthly installment of $150.00, there is the newspaper advertisement of Appellant which listed this car and 15 others for sale with "complete financing available." The evidence supports the implied finding that Appellant was a creditor.

Article 5069-7.01(e) in part provides:

> "* * * a contract in the form of a bailment or a lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the value of the motor vehicle sold and it is agreed that the bailee or lessee * * * has the option of becoming * * * the owner * * * [for no or nominal consideration] * * *."

This definition of a retail installment contract under the Texas Consumer Credit Code is similar to that of Regulation Z, and we think the trial Court correctly held that the instruments entered into by the parties constituted a retail

installment contract under the Texas Consumer Credit Code. The evidence supports such a finding, as well as an implied finding that the Appellant was a "retail seller." In addition to the newspaper advertising of the automobile for sale and the fact of its being for sale at the Padgett's Used Cars, where Appellee made a down payment of $700.00 and executed the instruments involved, there is the testimony of Butch Howard, the general manager of Appellant. He testified as follows:

> "Q I would like to go back into one point that we discussed, the circumstances under which one of Tom Benson Leasing owned vehicles might appear on a used car lot of a used car dealer somewhere around town. Can you tell me, does that, in the ordinary course of Tom Benson's dealing, occur on occasion?
>
> "A Yes.
>
> "Q A vehicle that you own appears on the car lot for sale, of a used car dealer?
>
> "A True.
>
> "Q Why would that occur?
>
> "A As I explained in my deposition, we don't have facilities for selling used cars of any type. We're not on a main thoroughfare. Therefore on occasion we do let cars out to different locations. It's not a normal practice. It's something that does come up and we do allow it to occur."
>
> "Q Then I take that testimony to mean that you do on occasion sell vehicles; Tom Benson Leasing?
>
> "A Yes, we do.
>
> "'Q Do you retail vehicles as opposed to wholesaling them to dealers?
>
> "A Very uncommonly; but, yes, we do.

> "Q You do on occasion retail right to the consumer?
>
> "A Yes."

Article 5069-7.01 defines a "retail seller" as "a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions."

All points of error have been considered and all are overruled. The judgment of the trial Court is affirmed.

/s/ Stephen F. Preslar
Stephen F. Preslar, Chief Justice

August 16, 1978

CLERK'S OFFICE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS
ANNE D. RAY, CLERK

El Paso, Texas, March 27, 1979

I, ANNE D. RAY, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, at El Paso, do hereby certify that the preceding 5 pages contain a true and correct copy of the opinion of the Court of Civil Appeals, delivered by Honorable STEPHEN F. PRESLAR, *Chief Justice*, on the 16th day of August A.D. 1978, in the cause No. 6718.

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant*,

VS.

KENNETH WAYNE ALLEN, ET UX., *Appellees*,

now on file in my office at El Paso.

IN TESTIMONY WHEREOF, I have hereunto set my hand with the seal of said Court, the same day and date above written.

/S/ ANNE D. RAY, *Clerk*

APPENDIX C

COURT OF CIVIL APPEALS
EL PASO

No. 6718

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant*,

V.

KENNETH WAYNE ALLEN, ET UX., *Appellees*.

Appeal from 57th District Court of Bexar County, Texas.

Judgment

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed that the judgment of the Court below be in all things affirmed; and that the appellees, Kenneth Wayne Allen and wife, Dolores Allen, do have and recover of and from the appellant, Tom Benson Chevway Rental & Leasing, Inc., and of and from the cash deposit placed with the Clerk of the trial Court in lieu of an appeal bond, all costs incurred by reason of this appeal, and this decision be certified below for observance.

Dated: August 16, 1978.

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, ANNE D. RAY, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the preceding page is a true and correct copy of the Judgment rendered by the Court on the 16th day of August, 1978, in Cause No. 6718.

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant,*

v.

KENNETH WAYNE ALLEN, ET UX., *Appellees,*

as same appears of record in Volume 17, at Page 264, of the Minutes of this Court.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of said Court, at El Paso, Texas, this the 27th day of March, A.D. 1979.

/s/ ANNE D. RAY
Anne D. Ray, Clerk

APPENDIX D

COURT OF CIVIL APPEALS
EL PASO

No. 6718

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant,*

v.

KENNETH WAYNE ALLEN, ET UX., *Appellees.*

Appeal from 57th District Court of Bexar County, Texas.

Order

This day came on to be heard appellant's motion for rehearing, and the Court having considered the same is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that appellant's said motion for rehearing be, and the same is hereby, overruled.

Dated: September 13, 1978.

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, ANNE D. RAY, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the preceding page is a true and correct copy of the Order rendered by the Court on the 13th day of September, 1978, in Cause No. 6718.

TOM BENSON CHEVWAY RENTAL & LEASING, INC., *Appellant*,

v.

KENNETH WAYNE ALLEN, ET UX., *Appellees*,

as same appears of record in Volume 17, at Page 277, of the Minutes of this Court.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of said Court, at El Paso, Texas, this the 27th day of March, A.D. 1979.

/s/ ANNE D. RAY
Anne D. Ray, Clerk

APPENDIX E

IN THE SUPREME COURT OF TEXAS

No. B-7995

December 6, 1978

TOM BENSON CHEVWAY RENTAL & LEASING, INC.

vs.

KENNETH WAYNE ALLEN, ET UX.

From Bexar County, Eighth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Tom Benson Chevway Rental & Leasing, Inc. pay all costs incurred on this application.

No. B-7995

January 17, 1979

TOM BENSON CHEVWAY RENTAL & LEASING, INC.

vs.

KENNETH WAYNE ALLEN, ET UX.

From Bexar County, Eighth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 27th day of March, 1979.

GARSON R. JACKSON, Clerk
/s/ By MARY M. WAKEFIELD, Deputy
Mary M. Wakefield